

What Bounds A-Legality?

Sofia Näsström
Department of Government
Uppsala University
Sofia.Nasstrom@statsvet.uu.se

ABSTRACT

This comment discusses Hans Lindahl's central idea of a-legality. It begins by positioning the idea of a-legality in the literature on the constituent power of the people, showing how it advances the discussion at hand. Having done that, it raises two questions regarding the conceptual and normative significance of the politics of a-legality. Is a-legality contingent on a certain form of consciousness, or a certain form of government? And, what is the basis of the normative recommendation that legal collectives ought to respond to a-legality with collective self-restraint? The aim of both questions is to identify what bounds Lindahl's idea of a-legality.

KEYWORDS

A-legality, constituent power, fear, normativity, democracy, Lindahl

1. Introduction

Today many political conflicts revolve around boundaries. Globalization, secession and migration have shifted the political attention from the constituted to the constituent power of the people. At issue is nothing less than the appropriate basis of collective self-government: Who ought to belong to “we, the people”? In these debates, the prerogative of the state to decide matters of inclusion and exclusion typically stands against the normativity of a boundless cosmopolitan law. Still, the fact that neither statism nor cosmopolitanism can put a stop to the *petitio principii* of modern constitutional law—one can always ask who authorizes these positions in turn—raises the suspicion that legal theory is at a loss when confronted with some of the most pressing political conflicts of our time. It abandons politics at the moment when it is needed the most.

In *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, Hans Lindahl sets out to prove the opposite. He makes two central moves, and together they serve to open up the boundaries of legal collectives to systematic and normative thinking. The first move is to separate law from statehood, and thereby to show that the distinction between domestic and foreign politics associated with the modern state system is contingent on a more general theory of legal inclusion and exclusion. The second move is to separate law from moments of a-legality, by which is meant “strange behavior and situations that, evoking another realm of

practical possibilities, question the boundaries of (il)legality.”(p. 3) What results is a powerful argument against the political reductionism of our time. The central message of the book is that the state does not have the final word on matters of inclusion and exclusion, and justice is not as boundless as cosmopolitans would have it. The fact is that “[a]ny legal order we could imagine must have boundaries” (p. 3), and the task is therefore to understand how they do their work of including and excluding, and thereby also of constructing and challenging what counts as right, just and reasonable in a given historical situation.

The originality and depth of this book makes it impossible for me to do justice to it in a short commentary. I will therefore concentrate on one topic, and that will be the significance of the politics of a-legality. According to Lindahl, every legal collective harbors “a normative blind spot which it can neither suspend nor entirely justify”, and it is by responding to such moments of strangeness that legal collectives receive their unique and defining characteristics (p. 7). In what follows, I am interested in the conceptual and normative significance of this argument. A-legality is not a universal phenomenon. It is a concept situated within “the broader historical horizon of Western modernity” (p. 97), and this raises the question of what that historical horizon actually entails. Is the concept of a-legality contingent on a certain form of consciousness, or a certain form of government? Furthermore, the politics of a-legality is not merely an analytical figure. It also entails a normative recommendation, namely that legal collectives respond to the strangeness of a-legality with “collective self-restraint” (p. 249). But granted that a-legality cannot be subsumed under a legal code, one is prompted to ask for the authorization behind this recommendation. On what basis can Lindahl conclude that collective self-restraint is the appropriate normative response to a-legality?

Let me start out, however, by positioning the politics of a-legality in the literature on the constituent power of the people, and show how it advances the discussion at hand.

2. *The politics of a-legality*

The constituent power of the people is a central, but neglected question of modern constitutional law (Kalyvas 2008; Honig 2009; Loughlin 2013). It is central since no modern theory of law can avoid it: the constituent power of the people is the ultimate source of all legitimate law. It is neglected since any attempt to account for its legitimacy typically falls prey to a *petitio principii*; it becomes entangled in the very political disputes that it seeks to resolve. For political theorists accustomed to put their trust in reason as a way of resolving political conflicts, this *petitio principii* points to a weakness of modern constitutional law. It compromises the idea of collective self-government as a self-authorized form of power. To pre-empt

this weakness, many political theorists draw a Maginot line between the constitution of the people, on the one hand, and the constitution of law, on the other (Näsström 2007). They argue that if the people cannot decide on its own constitution without falling prey to an infinite regress, it cannot be part of a normative theory of law. It must be determined by other factors, such as the contingent forces of history.

Hegel is probably among the first to draw this conclusion. To ask “who is to draw up the constitution”, he asserts, is “nonsensical”. It presupposes that “no constitution as yet exists” (Hegel 1991, p. 311). Habermas agrees. In his view, “one cannot explain in purely normative terms how the universe of those who come together to regulate their common life by means of positive law should be composed.” The constitution of the people arises out of “the decision of the founding fathers to order their life together legitimately by means of positive law”, and it is the task of their descendants to “tap the system of rights ever more fully” (Habermas 1998, pp. 115, 218; 2001 pp. 772-776). In a similar vein, Neil Walker argues that “we can never warrant the democratic credentials of any decisive act, including a decisive act of institution (why *these* people using *this* process?), except in terms of an already constituted system that purports to specify both the people and the processes through which their collective will is represented” (Walker 2007, pp. 248-49).

This is where the novelty of Lindahl’s approach emerges. The central point he makes is that the *petitio principii* of modern constitutional law does not signal a weak spot, but a *blind* spot. The difference is telling, for whereas the former indicates a situation of failure, the latter indicates a situation of estrangement. It implies that no legal collective can be fully transparent onto itself. Every legal collective “has a blind spot in the form of normative claims that resist integration into the circle of reciprocity and mutual recognition, yet which the collective cannot simply shrug off as specious” (p. 222). Lindahl addresses a number of intriguing examples to illustrate this point. One of them is the Landless Workers Movement in Brazil (MST). By occupying unused land to attain food security for poor and landless workers, this movement breaches existing property rights and therefore appears illegal from the perspective of Brazilian law. At the same time, the movement deliberately seeks to challenge what counts as reasonable and just by refusing to abide by the law that judges it.

How is one to assess this case? Are the acts undertaken by the Landless Workers Movement illegal, or a-legal? The fact is that we cannot tell without falling prey to a *petitio principii*, and this is precisely the point made by Lindahl. There is no self-evident answer to this question. Every response we give is bound to be political. To think that one could circumvent the regress by writing it off as a marker of relativism, defeatism or skepticism will not do: “To engage in such tactic is to collapse responsiveness into a politics of boundaries that neutralizes or assimilates

normative claims that definitely resist inclusion in the legal order they question.” (p. 239) Put differently, this tactic only becomes one response among others in the conflict on who “we, the people” of Brazil are. Such is the politics of a-legality: it engages us in a fault line of normativity that can neither be fully justified nor suspended.

What can one see or do with this understanding of law that one could not see or do before? Lindahl approaches law from a first person plural perspective. From this perspective, law does not exist in a realm extraneous to those who abide by it. Norms of inclusion and exclusion are a matter of collective self-identification and de-identification (p. 191ff). They are formed, sustained and disrupted through everyday human behavior, ranging from the most mundane events of going shopping and dining to the most dramatic and exceptional events, such as those associated with Anders Behring Breivik’s defense of the shootings at Utoya or the Canadian Supreme Court’s ruling in the case of Quebec’s claim for secession. The fact that law is a matter of collective self-identification and de-identification changes the direction of the normative discussion. It means that how legal collectives respond to moments of a-legality not only has the power to transform the meaning of law. It also reveals their innermost normative priorities. To borrow Hannah Arendt’s terms, it discloses “who” as opposed to “what” they are (Arendt 1998, p. 179).

I believe there are two important merits to this view. First of all, it tells us why we ought to be “afraid of our fear” (Esposito 2010, p. 21). Hobbes writes in his autobiography that his mother was so afraid of the Spanish inquisition that she gave birth to twins—himself and fear—and one way to respond to moments of a-legality is certainly with fear. A-legality calls our attention to strange acts and situations that are not yet codified in law, and such acts can be frightening. Indeed, they can be more frightening than the most hideous criminal act for the simple reason that in the latter case we at least know how to respond. When someone occupies unused land with the motivation that existing norms of property rights are illegitimate, or when a group of people walks into a food store to buy groceries and leaves it without paying under the motto that they belong to the precariat (p. 31) it creates estrangement. Who are these people, and why are they behaving as they do? The trouble is that while fear is a common response to such moments of a-legality, it produces “ontological security” by transforming a strange situation into a familiar one (Mitzen 2006). It criminalizes abnormal behavior, and thereby forecloses the normative possibilities that such behavior may open up in the realm of politics and law.

Second, a-legality challenges the distinction between domestic and foreign politics. As Lindahl puts it, “a strange place need not be foreign; conversely, foreign places need not be strange” (p. 42). This insight is perhaps the most important lesson conveyed by the politics of a-legality. It serves to remind us that the distinction between domestic and foreign politics is contingent on the existence of a legal

collective taken in first person plural perspective. Today a number of democratic countries are in the midst of establishing new institutions and administrative procedures by which to cope with migrants and refugees seeking to create a new life for themselves and their families. These institutions and procedures often adopt measures that most legal collectives would deem unacceptable in domestic politics, such as arbitrary searching, racial profiling and long term detention. The critical point conveyed by Lindahl's approach is that these measures already *are* domesticated. The distinction between us and them is something that "we" make, and how a legal collective responds to the needs of migrants and refugees is therefore an integral part of its own collective self-understanding. It discloses who they are.

A similar point has been made by Foucault and Arendt in relation to the practice of colonialism. As they argue, European countries did not go unaffected by the foreign policies undertaken in the epoch of colonization. What these countries did abroad was part of their own collective self-understanding, which is why the racism exercised in the colonies did not *stay* there. It was also brought back home:

It should never be forgotten that while colonization, with its techniques and its political and juridical weapons, obviously transported European models to other continents, it also had a considerable boomerang effect on the mechanisms of power in the West, and on the apparatuses, institutions and techniques of power. A whole series of colonial models was brought back to the West, and the result was that the West could practice something resembling colonization, or an internal colonialism, on itself. (Foucault 2003, p. 103. See also Arendt 2004, Part II)

3. Probing the conceptual and normative significance of a-legality

It should be clear by now that responding to a-legality is quite demanding. It requires not only that we overcome our own fear, but that we adopt a reflexive stance vis-à-vis the claims of inclusion and exclusion carried out in our name. This immediately raises the question of what it takes to uphold the politics of a-legality. How does one prevent a legal collective from falling into an abyss of fear, and eventually succumbing to a politics reduced to that of friends and enemies?

This brings me to the first and conceptual question that I would like to raise as a comment to the book, namely whether the concept of a-legality is contingent on a certain form of consciousness or a certain form of government. According to Lindahl, a-legality encompasses a moment of strangeness that disrupts the distinction between the legal and the illegal. In this capacity, it has the potential to change the meaning and direction of a legal order. Yet, this moment of strangeness

does not refer to alterity in Levinas's sense of the term, which is a moment otherwise than being (Levinas 1981). Lindahl is careful to point out that the concept of law that he develops in the book is historically situated. It is worked out from within the broader historical horizon of Western modernity (p. 97). As we saw above, this horizon brings with it a problematic baggage in the form of Eurocentrism, and Lindahl is of course aware of this heritage. Still, he points out that although his work has its roots in modernity, "it also turns back on it to critically interrogate key aspects of the conceptual framework that has governed the modern conception of legal order." (p. 97).

The argument that a philosophical enquiry built on a-legality has the capacity to reflect upon and critically interrogate its own origins is compelling. The question though is how we are to understand the source of that reflexivity. Where does it come from? One possible reading would be to argue that such reflexivity is nurtured by a specific historical consciousness. The argument would be that in modernity, individuals are bereft of pre-modern sources of authority. They can no longer rely on nature, God or tradition in the authorization of law. On the contrary, they have come to understand that society at bottom is a social construct, and that human beings in this way have the power to write their own history. At times, it seems as if this is what Lindahl has in mind when he speaks of a-legality. It is associated with a human consciousness aware of "the contingency of contingency", i.e. of the hiatus between question and response (pp. 258, 206ff).

At the same time, this reading seems too general to grasp the specificity of a-legality. A-legality does not refer to human consciousness in general. It refers to a human consciousness oriented towards a *legal* order, and not just any legal order, but one that acknowledges the role of the constituent power of the people in the authorization of law. After all, it is this idea of collective self-government—the demand that a people should be once the authors and the addressees of law—that gives rise to the *petitio principii* of modern constitutional law, and therefore opens up a legal collective to what is strange and other to itself. My interpretation, then, is that when Lindahl speaks of a moment of a-legality that can be neither fully justified nor suspended, he is not speaking of legal order *per se*. He is referring to a certain form of government in Montesquieu's sense of the term, albeit one that Montesquieu himself never had the chance to reflect upon: namely a modern and paradoxical form of democratic self-government. If this reading is correct, it means that while a-legality has the power to interrupt the boundaries of an existing legal order, it is not itself boundless. It epitomizes a distinctively democratic form of legal order.

The second question that I would like to raise is more straightforward, and it concerns Lindahl's recommendation that legal collectivities ought to respond to a-legality with collective self-restraint. According to Lindahl, a legal collective should "restrain itself from neutralizing or destroying the bearers of normative

claims which resist inclusion into the circle of legal reciprocity.” (p. 249) In contrast to Schmitt, who maintains that the decisions taken by a legal collective ultimately is a matter of survival, Lindahl suggests that the normative task of a legal collective is to *endure* rather than overcome its finitude (p. 254). As he reformulates it, sovereign is the one who decides “to sustain rather than to destroy the strange as strange.” (p. 254)

The normative recommendation suggested by Lindahl is not merely deeply sympathetic. It also has a realistic kernel to it. Fear can expand to the point where it takes over completely, and by welcoming and making room for what is strange this recommendation offers a much needed countermeasure to the fearful and alarmed response characteristic for the Hobbesian state. Still, sometimes we have good reason to fear what is strange. Indeed, one could imagine situations when it is rational *not* to endure collective finitude, but to destroy what comes to question the legal order. How do we tell when such a situation occurs? The tricky thing is that we cannot: “Boundary-setting is responsive in that it establishes retroactively whether and how behavior is a-legal in the very act of establishing what counts as legal and illegal behavior. “ (p. 205). Against this background, one is prompted to ask what authorizes Lindahl to conclude that collective self-restraint is the appropriate normative response to a-legality. Granted that a-legality only can be established retroactively, what could be the basis of this claim?

I am aware that the questions raised above may push the author a bit beyond the scope of his own enquiry. Still, it is my belief that the quality of a book should be judged by the wonder and curiosity it instils among its readers. In line with the Greek assumption that it is wonder that stands at the origin of thinking, this book not only offers analytical clarity on a question that for long has bewildered political and legal theorists, namely how to make sense of the constituent power of the people; it does so in a way that retains our sense of wonder at the world we call our own.

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